in such origins could never become general international law but would remain a simple contract binding only on the signatories'[9]. These statements are unfortunate but true.

Similarly any codification of a twelve mile limit in 1973 will only be binding on those countries that sign and ratify the convention. The attitude already displayed by such countries as Peru and El Salvador makes it unlikely that these countries would accept such a convention. It is possible, of course, that if offered benefits under the resources exploitation scheme, they could be 'persuaded' to change their minds. Whether that eventuates or not, it would seem almost certain that by the end of 1973 the nations of the world will have reached substantial agreement on a twelve mile limit for measuring the extent of their territorial seas.

BRUCE G. DRINKWATER

PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LIMITED v. ROBERTS[1]

Settlements—Proper law—Construction and interpretation—Whether gifts to 'children' confined to legitimate children.

Substantially similar settlements were made in 1955 and 1956 by the father and the sister of one Mona Lech in favour of Mona and her children. The 1955 settlement was constituted by shares in companies registered in Victoria, that of 1956 by £1,250 in Australian currency. The settlors believed Mona to be lawfully married to Zbigniew Lech. The marriage was, however, declared a nullity, Zbigniew having been already married at the time of the ceremony with Mona. Thus their two children, Anna and Robert, were illegitimate at common law. A third child, Elizabeth, also illegitimate, was born later and adopted by Mona. Mona subsequently migrated to Victoria from England with her children.

An Originating Summons was taken out by the trustees to determine whether these children were 'children' within the meaning of the settlements. This required consideration of the appropriate law to apply—English or Victorian. The settlors were presumed to be domiciled in England for the purposes of the proceedings but the trust deeds and assets were situated in Victoria and administered by the plaintiffs, a Victorian company. The place of execution of the 1955 settlement was unknown. The 1956 settlement was probably executed by the settlor in England and by her brother in Pakistan. The plaintiffs executed both deeds in Victoria.

McInerney J., noting the paucity of settled law in this area of voluntary settlements, held Victorian law applicable to the deeds of settlement. The decision in *Lindsay v. Miller*[2] indicates that the tests used to determine the proper law governing voluntary settlements are the same as those used to ascertain the proper law of a contract. In the absence of an express intention the proper law is ascertained by determining the system of law with which each deed of settlement has the most real and substantial connection. To discover the settlor's 'constructive' intention consideration should be given to the settlor's domicile, the place of execution, the location of the

[9] *Ibid.*

[1] [1970] V.R. 732. Supreme Court of Victoria; McInerney J.

[2] [1949] V.L.R. 13.

trust deeds and assets and the place of administration. The particular choice of Victoria as the location of the trust assets and the selection of a Victorian company to administer them indicated an intention that the settlements be governed by Victorian law.

The formulation of the test is in accord with such authority as exists. Dicey and Morris in *The Conflict of Laws* (8th ed. 1967) do not deal specifically with the question of choice of law in relation to the validity of voluntary settlements. However Cheshire in *Private International Law* (7th ed. 1965) 469, states the law:

> The essential validity of a settlement, whether voluntary or made in consideration of marriage, is governed by its proper law, i.e. the law of the country with which it is most closely connected and to which, therefore, it must be assumed that the parties intended to submit themselves.

This statement closely approximates the test propounded by Lord Simonds on behalf of the Privy Council in *Bonython v. Commonwealth of Australia*,[3] 'the system of law by reference to which the contract was made or that with which the contract has its closest and most real connexion'.

Support for the assimilation of the law of contracts and of voluntary settlements can be found.[4] The decision in *Permanent Trustee Co. (Canberra) Ltd v. Permanent Trustee Co. of N.S.W. Ltd*[5] is of particular interest. In that case a settlor domiciled in New South Wales executed a deed of settlement, the assets of which were entirely located in the Australian Capital Territory. The Trustee Company was also based in Canberra. Fox J. reached a similar conclusion to the present case, holding the settlement to be governed by the law of the Australian Capital Territory because it was more closely connected with that law. He also noted the similarity between this approach and the test for the proper law of a contract. The position concerning voluntary settlements has been explored in much greater depth in the United States of America and also accords with the conclusions of McInerney J.[6]

Victorian law was also applicable to the construction of the deeds of settlement. In construing the settlements it mattered little whether the law of England or of Victoria applied for 'the canons of construction of the document are the same'.[7] McInerney J. observed that there may be more than one governing law in respect of a contract and the same result may obtain in respect of a deed of settlement, but he was not called on to consider this point here. He referred to his earlier decision in *Weckstrom v. Hyson*[8] in support of this observation.

[3] [1951] A.C. 201, 219.

[4] *Lindsay v. Miller* [1949] V.L.R. 13; *Iveagh v. Inland Revenue Commissioners* [1954] Ch. 364; *Re Pilkington's Will Trusts*: *Pilkington v. Harrison* [1937] 3 All E.R. 213.

[5] (1969) 14 F.L.R. 246; *cf. Miller v. Whitworth Street Estates* [1970] 2 W.L.R. 728, Lords Reid and Wilberforce dissenting (following Lord Denning in *In re United Railways of the Havana and Regla Warehouses Ltd* [1961] A.C. 1007, 1068). The 'most real and substantial connexion' could be either with a system of law *or* the place of performance. The majority, however, restated the test in terms of connexion with a system of law. The place of performance was only a factor to be considered, albeit a very important one, in discovering the parties' intentions as to which system of law governed.

[6] See *Scott on Trusts* (3rd ed. 1967) v. ch. 14 paras 597-601 and 612.

[7] [1970] V.R. 732, 738.

[8] [1966] V.R. 277, 282-5.

This statement seems the correct view of such authority as exists and certainly the preferable one. The authorities are silent on the law regarding voluntary settlements and guidance must again be sought from the law governing contracts. Cheshire states that:

> not all the matters affecting a contract are necessarily governed by one law. The correct inquiry is not — What law governs a contract? It is — What law governs the particular question raised in the instant proceedings? . . . The questions, for instance, whether agreement has been reached, whether the parties possess capacity, whether the contract is formally valid or what interpretation is to be put on a paricular clause in the contract do not necessarily fall to be governed by the same law.[9]

The courts too, have acknowledged that a contract may be governed by more than one law.

> The fact that one aspect of a contract is to be governed by the law of one country does not necessarily mean that that law is to be the proper law of the contract as a whole.[10]

Many cases, seemingly opposed to this view, rather ignore this possibility because it was not relevant, or simply assume all aspects of the contract to be governed by the proper law.[11]

Some examples suffice to show the advantages of the more flexible approach in enabling the actual intentions of the parties to be followed. Parties to a contract may expressly state that certain aspects of it are to be governed by the law of one country although the proper law of the contract may be the law of another country; or parties to a contract may imply, by the use of words or phrases which make sense only by reference to another system of law, or by subsequent conduct,[13] that aspects of the contract are to be governed by another system of law. The *Permanent Trustees* case[14] also appears to support the views expressed by McInerney J. Fox J. notes the distinction between essential validity, and interpretation and construction, but finds that 'in the present case' construction is to be governed by the same law. (In the United States of America it is clearly recognised that more than one law may be applicable.[15])

The decision in this case is important as it concisely states the test to be applied to voluntary settlements in determining the proper law of the settlement and confirms the decisions in previous cases. It also lends weight to

[9] Cheshire, *Private International Law* (7th ed. 1965) 185-6 and 213-4.

[10] *In re United Railways of the Havana and Regla Warehouses Ltd* [1960] Ch. 52, 92; and see *Kahler* v. *Midland Bank Ltd* [1950] A.C. 24, 42.

[11] *E.g. Lloyd v. Guibert* (1865) L.R. 1 Q.B. 115; *Lindsay v. Miller* [1949] V.L.R. 13. Lowe J. regarded questions as to the construction and the validity of a voluntary settlement as raising only one issue, the proper law of the settlement; *McClelland v. Trustees Executors and Agency Co. Ltd* (1936) 55 C.L.R. 483, 491-3. Dixon J. implies that all aspects will be governed by the proper law.

[12] This point arose, but did not require decision, in *Rowett, Leakey & Co. v. Scottish Provident Institution* [1927] 1 Ch. 55, where a contract of insurance contained the expression 'bona fide onerous holder'. The expression is familiar to Scots law.

[13] *Miller v. Whitworth Street Estates* [1970] 2 W.L.R. 728, where a contract in the standard form of the Royal Institute of British Architects was held to be governed by English law but the standard form arbitration clause by the law of Scotland when, after application for arbitration, a Scots arbitrator was appointed and proceedings were in Scots form, neither party objecting.

[14] (1969) 14 F.L.R. 246, 254.

[15] *Scott on Trusts* (3rd ed. 1967) v. ch. 14 paras 575-6.

the proposition that a contract (and a settlement) may be governed by more than one system of law. In an area almost devoid of authority this view is preferable as the intention of the parties may be more closely adhered to and the advantages of flexibility are retained.

Having decided Victorian law was applicable to the settlement McInerney J. had then to interpret the meaning of the word 'children' as used in the settlement. 'Children' carries the same meaning in wills as in settlements *inter vivos*. Thus judicial decisions on wills can be referred to in determining its meaning in the two settlements.

The rule of construction is that 'children' must be read as 'legitimate children'.[16] Judicial decision has created only two exceptions to the rule in *Hill v. Crook*:

(i) where no legitimate children answering the description exist, and there is no possibility of future legitimate children, then the testator is presumed to have contemplated illegitimate children;[17] and

(ii) where illegitimate children are named in the will or are expressly included as a class, where the testator indicates by the language of the will that illegitimate children are to take.[18]

The first exception does not extend to illegitimate children born after a deed of settlement or will has been executed, but only to existing illegitimate children.[19] This limitation is based on the same ground of public policy as the rule in *Hill v. Crook*, namely the need to preserve formal marriage and the family as social institutions. If illegitimate children can benefit equally with legitimate children then the sanctity of marriage is correspondingly diminished.

McInerney J. discerns two categories of cases where the question of whether 'children' included 'illegitimate children' arose.[20] In most of the cases the children were issue of a reputed or an invalid marriage. In the first category 'the children in question were the children of the testator or settlor and his reputed wife or a woman with whom he had gone through the form of a marriage which was to his knowledge invalid'.[21] Here the testator or settlor has obviously been aware of the true facts and there has generally been sufficient indication of the intention of the testator to include his own illegitimate children.[22]

[16] *Wilkinson v. Adam* (1813) 1 V. & B. 422, 462; *Hill v. Crook* (1873) L.R. 6 H.L. 265, 282.

[17] *In re Eve* [1909] 1 Ch. 796 where the testatrix gave her residuary estate to her sister's children, the sister being 68 and a widow. The children were illegitimate, a fact known to the testatrix. It was held that they took the gift, since there were no legitimate children who could answer its terms. *Cf. Dorin v. Dorin* (1875) L.R. 7 H.L. 568 where the testator had two illegitimate children by a woman he subsequently married. By a will made immediately after the marriage he left his residuary estate to 'my children by [my wife]'. There were no further children. It was held that the children could not take, since it was possible that the testator and his wife could have had legitimate children after making the will.

[18] *Hill v. Crook* (1873) L.R. 6 H.L. 265, 283; see also *Halsbury's Laws of England* (3rd ed. 1962) xxxix. 1070-5, paras 1598-1602.

[19] *Crook v. Hill* (1876) 3 Ch.D. 773; *In re Bolton* (1886) 31 Ch.D. 542.

[20] [1970] V.R. 732, 746-8 for a discussion of the cases.

[21] *Ibid.* 746.

[22] *E.g. In re Wohlgemuth* [1949] Ch. 12 where the testator made a will in favour of his children knowing his only children were illegitimate, but also aware that he could beget no more children.

In the second category the gift was to children of some named person other than the testator or settlor. This category 'may be subdivided into cases (a) where the true facts have been known to the testator or settlor; (b) where the testator or settlor had been unaware of the true facts'.[23] The *prima facie* rule of construction has been applied most frequently to cases within subdivision (b) and the illegitimate children excluded, because the testator or settlor, unaware of the true facts, had failed to indicate that illegitimate children were intended.[24]

The present case is in the second category and would appear to fall squarely within subdivision (b) of that category, but McInerney J. is desirous of avoiding the unjust result that follows. Thus the deeds must be construed in the light of the circumstances as known to the settlors to ascertain whether there was an intention to benefit these particular children, Robert and Anna. He finds support for this approach in the statements of eminent judges reiterating the right of the court in all instances to look at the words used and the extrinsic circumstances surrounding the choice of such words and disapproving the blanket application of a rule of construction.[25] The primary function of the court is to determine the intention of the testator or settlor and to comply with that intention as far as the law will allow. In the present case both settlors believed the marriage valid and that the two children were the legitimate offspring of that marriage. Each settlor intended to confer a benefit on the children of Mona by her (supposed) marriage with Lech. The illegitimacy of the children came about through a technical conclusion of the law and not through any misdeeds of the parents. The dominant intention of the settlors was to benefit the children already born to Mona as a result of her union with Lech, and the attribute of legitimacy was not the essential factor. Lord Chelmsford observed in *Hill v. Crook*[26] that gifts may be made to 'existing illegitimate children' if the intention is clear. Such observations also fit the case where the gift is to 'existing children, then believed legitimate but subsequently discovered to be illegitimate'.[27]

The decision that Anna and Robert were intended to take under the settlement, while achieving a just result, extends the second exception to the rule in *Hill v. Crook*.[28] In the past the courts have (generally) declined to go beyond the text of the will in order to ascertain the testator's intentions. Only where the illegitimate children were named in the will, or there was a reference to them, has the rule of construction been relaxed. Mere belief that the children are legitimate has been generally considered insufficient:

[23] [1970] V.R. 732, 747.

[24] *In re Taylor, Hacksley v. O'Neal* [1925] 1 Ch. 739 where a disposition in favour of the 'child or children' of H, the testatrix's nephew, could not operate in favour of an illegitimate child, the testatrix being unaware the child was illegitimate.

[25] Lord Blackburn in *River Wear Commissioners v. Adamson* (1877) 2 App. Cas. 743, 763. 'In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used.' See also Lord Halsbury in *In re Jodrell: Jodrell v. Seale* (1890) 44 Ch.D. 590, 605.

[26] (1873) L.R. 6 H.L. 246, 278.

[27] [1970] V.R. 732, 755.

[28] *Supra* p. 178.

> Suppose the gift is to the children of A, a living person, and there is nothing on the face of the will to show that existing or illegitimate children are intended, the court is not at liberty to infer from surrounding circumstances that existing illegitimate children are intended to be included, for instance, from the fact that the testator believed A to be married and was on terms of familiarity with A's illegitimate children, whom he believed to be legitimate. Strong probability is not enough.[29]

This statement in *Theobald on Wills* (7th ed. 1908) was approved in *In re Pearce*,[30] which case has been followed in Victoria, *In the Will of Sayer*.[31] These cases appear in direct conflict with the decision of McInerney J.

A just result has been achieved in this case by a process of judicial interpretation stretching the bounds of existing case law. There are limits, however, to judicial interpretation which highlight the need for legislative reform in this area. Had McInerney J. been unwilling to discern an intention to benefit these particular children the rule in *Hill v. Crook* would still have applied. Neither Anna nor Robert could be brought within the first exception to the rule, as there was a possibility of future legitimate children,[32] nor, in the absence of an expressed intention to benefit them, could they be brought within the second exception. Elizabeth too, is caught by the rule which prevents illegitimate children born after the execution of a will or deed from taking any benefit thereunder.[33]

The basis of the rule in *Hill v. Crook* was a concern to maintain the institution of marriage and the family structure. This object was achieved by punishing the (illegitimate) children for the sins of their parents, by placing the illegitimate child at a great disadvantage in order to encourage marriage. It is very doubtful whether such Victorian morality is relevant today when illegitimate births are large in number and increasing,[34] and when a relaxation of social *mores* is occurring. The retention of the rule could be better justified as a means of avoiding the problems of establishing paternity[35] and of false claims on the estates of wealthy people, but modern science (the use of blood tests) and legislative enactments can provide the answers to these problems. The continued existence of the rule in *Hill v. Crook* seems no longer justified and statutory revision is needed to enable the courts to discover the testator's intention independently of such presumptions.

Legislative reform of the rule has been enacted in some jurisdictions. The Family Law Reform Act 1969 (Eng.), section 15(1) curtails the operation of the rule by providing that any reference to the child, children or other relations of a person shall, unless the contrary intention appears, be construed as, or as including, a reference to any illegitimate child or other

[29] *Theobald on Wills* (12th ed. 1963) 273, para. 862. *E.g. In re Jodrell*: *Jodrell v. Seale* (1890) 44 Ch.D. 590; *Trustees Executors and Agency Co. Ltd v. Sadler* (1899) 25 V.L.R. 295.

[30] [1914] 1 Ch. 254, 264.

[31] [1921] V.L.R. 95. See also the statement of Dixon C.J. in *Attorney-General for the State of Victoria v. The Commonwealth* (1962) 107 C.L.R. 529, 545 that only 'a context aided by extrinsic circumstances leaving no logical escape will authorize any other interpretation'.

[32] [1970] V.R. 732, 753; at least no evidence to the contrary was produced.

[33] The effect of her adoption is considered below.

[34] In 1962, 5.4% of all births in Australia were 'illegitimate'; in 1967 the figure had risen to 7.73%.

[35] See McInerney J. [1970] V.R. 732, 753.

relation of that person. Section 15(2) does preserve the rule in certain limited instances, for example where the word 'heir' or 'heirs' is used. Section 15(7) abolishes the rule preventing after-born illegitimate children being included within the terms of a will or settlement.

The Status of Children Act 1969 (N.Z.)[36] abolishes the rule in *Hill v. Crook* and is the most advanced piece of legislation in this area. Section 3(1) makes all children of equal status. It provides that 'the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other, and all other relationships shall be determined accordingly'. Section 3(2) abolishes the rule in *Hill v. Crook*.

The rule will remain in force in Victoria until such time as similar legislation is enacted. Thus the decision of McInerney J. in this case is authority for an extension of the second exception to the rule but is not conclusive of the issue.

The third illegitimate child, Elizabeth, had been adopted by Mona in England, and it remained to determine the effect of this adoption. Victorian law was applicable to the adoption as the settlements were being construed according to the laws of Victoria.

The Adoption of Children Act 1964 recognises foreign adoptions where the adoption complies with the conditions enumerated in section 42 of the Act. The basic prerequisite of section 42 is that the adoption be effective according to the law of the country where the adoption order is made. Thus foreign adoptions not meeting the requirements for adoption in Victoria may nevertheless be recognised in Victoria as valid. For example, adoptions by single persons, quite simple in England,[37] are almost impossible in Victoria,[38] yet Victorian law will recognise English adoptions if they comply with the laws of England. Once recognised, the foreign adoption order is then given the same effect as an adoption order under the Act, that is the adopted child is treated as if born in lawful wedlock.[39] The adopted child may then partake in dispositions of property whether made before or after the Act came into force which 'have not yet taken effect in possession'.[40] In the present case the transfer of the deeds of settlement to the trustee company was a disposition of property, but there had been no taking effect in possession for the equitable interest only took effect in possession when the children attained 21 years of age. Thus the effect of the adoption order under Victorian law was to both legitimate Elizabeth and to include her as a beneficiary under the trust.

It is interesting to note that were English law applicable Elizabeth would have been excluded as the Adoption Act 1958 (Eng.) does not apply to

[36] 1969 No. 18.

[37] Adoption Act 1958 (Eng.), s. 1(3): '[a]n adoption order may be made authorizing the adoption of an infant by the mother or father of the infant, either *alone or jointly*, with her or his spouse'.

[38] Adoption of Children Act 1964, s. 10(1) states that an adoption order shall not be made otherwise than in favour of a husband and wife jointly. S. 10(2) states that in exceptional circumstances an order may be made in favour of one person (s. 10(3) however further limits the effect of s. 10(2)).

[39] *Ibid.* s. 32(1)(a): 'the adopted child becomes a child of the adopter or adopters, and the adopter or adopters become the parent or parents of the child as if the child had been born to the adopter or adopters in lawful wedlock'.

[40] *Ibid.* s. 33.

settlements made before the adoption order.[41] Thus the Victorian legislation, by giving the adoption order retroactivity, gives greater effect to the adoption order in Victoria than the same adoption order had in England. This result should be of particular interest to the large number of English immigrants to Australia (the Victorian legislation being part of a national scheme, all States having similar legislation) as local legislation may have unforeseen consequences for the interpretation of wills and settlements, or differing results depending on where the will or settlement was executed.

T. F. YUNKEN

J. & H. JUST (HOLDINGS) PTY LTD v. BANK OF NEW SOUTH WALES[1] LENSWORTH FINANCE PTY LTD v. WHITTENBURY[2]

Torrens System—Competing unregistered equitable interests—Priority—Effect of a failure to caveat.

Where there are competing unregistered equitable interests under the Torrens System priority is determined by the General Law principle *qui prior est tempore potior est iure*. Therefore, the equitable interest first in time prevails unless the holder, by some act or omission, has made it inequitable that he should be allowed to insist upon his priority. The general principle, as stated by Knox C.J. in *Lapin v. Abigail*[3] and approved by Kitto J. in *I.A.C. (Finance) Pty Ltd v. Courtenay*,[4] is that 'the possessor of the prior equity is not to be postponed to the possessor of a subsequent equity unless the act or omission proved against him has conduced or contributed to a belief on the part of the holder of the subsequent equity, at the time when he acquired it, that the prior equity was not in existence'. Whether the failure to lodge a caveat was alone sufficient to upset the priority of the prior equitable interest was the subject of somewhat different approaches by the courts in *Just (Holdings) Pty Ltd v. Bank of N.S.W.*[5] and *Lensworth Finance Pty Ltd v. Whittenbury*.[6]

In *Just (Holdings) Pty Ltd v. Bank of N.S.W.*,[7] the registered proprietor had mortgaged certain lands to the defendant bank, which took a memorandum of mortgage and the certificate of title. However, the bank failed to lodge a caveat or register the mortgage, and therefore a search at the Office of Titles by the plaintiff failed to reveal the existence of the prior mortgage. The registered proprietor represented to the plaintiff that the certificate of title was at his bank for safe keeping and for credible reasons the plaintiff agreed that it should remain there.

Helsham J. decided that a mere omission to caveat was insufficient to postpone the prior equity, for *Butler v. Fairclough*[8] was not 'authority for the proposition that failure to caveat will postpone a prior equity in

[41] S. 16 which deals with the effects of adoptions on wills and settlements, speaks only of children adopted before the execution of a will or settlement and does not apply to subsequent adoptions such as Elizabeth's.

[1] (1970) 90 W.N. (N.S.W.) (Pt. 1) 571. In Equity, Helsham J.
[2] 1970 Supreme Court of Victoria, unreported, Lush J.
[3] (1930) 44 C.L.R. 166, 183-4.
[4] (1963) 110 C.L.R. 550, 575-6.
[5] (1970) 90 W.N. (N.S.W.) (Pt. 1) 571.
[6] 1970, unreported.
[7] (1970) 90 W.N. (N.S.W.) (Pt. 1) 571.
[8] (1917) 23 C.L.R. 78.